# Hock Seng Construction Sdn Bhd & Anor v Yong Kon Fatt & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A–02–525 OF 2000

SHAIK DAUD, ABDUL HAMID MOHAMAD AND ABDUL KADIR SULAIMAN JJCA

15 JUNE 2001

***Civil Procedure*** *— Appeal — Record of appeal — Extension of time — Filing of supplementary record of appeal — Undue delay — Lack of explanation — Whether delay fatal*

The appellants had filed a notice of motion for an order that they be granted an extension of time to file a supplementary record of appeal to include evidence which was left out, ie the evidence of the first respondent. The respondent objected to the notice of motion on the ground that there was undue delay in applying for the extension and that no explanation was given whatsoever for the delay.

**Held**, dismissing the motion with costs:

The affidavit in support of the motion gave no explanation whatsoever as to why the sealed copy of the order was not filed together with the original records of appeal. The mistake of the solicitors in not filing the sealed copy of the order on time cannot constitute an explanation. It is trite that the courts have a discretion to extend time to file documents. A delay in filing per se is not fatal but a delay with complete lack of explanation as to why there was a delay is fatal. In order to justify a court in extending the time there must be some material upon which the court could exercise its discretion. Therefore the motion must be dismissed. In the light of this there was no appeal proper before this court and the appeal was struck out (see pp 500H–I, 501B–D).

**[Bahasa Malaysia summary**

Perayu-perayu telah memfailkan notis usul untuk satu perintah bahawa mereka diberikan perlanjutan masa untuk memfailkan rekod rayuan tambahan untuk memasukkan keterangan yang belum disertakan, iaitu keterangan responden pertama. Responden telah membantah menyatakan bahawa terdapat kelewatan yang tidak wajar dalam permohonan perlanjutan masa, dan lagipun tiada alasan yang telah diberi untuk kelewatan tersebut.

**Diputuskan**, menolak usul tersebut dengan kos:

Afidavit sokongan usul tersebut tidak memberi sebarang alasan kenapa salinan termeterai perintah tersebut tidak difailkan bersama dengan rekod-rekod rayuan yang asal. Kecuaian peguam-peguam dalam tidak memfailkan salinan termeterai perintah tersebut bukan

merupakan alasan yang sah. Ia adalah mantap bahawa mahkamah-mahkamah mempunyai budi bicara untuk melanjutkan masa dalam pemfailan dokumen-dokumen. Kelewatan dalam pemfailan per se tidak membawa padah, tetapi kelewatan tanpa alasan kelewatan tersebut membawa padah. Bagi mahkamah menjustifikasikan perlanjutan masa, perlu terdapat alasan yang membolehkan mahkamah menggunakan budi bicaranya untuk melanjutkan masa. Oleh itu, usul ini terpaksa ditolak. Tiada rayuan yang sah, dan rayuan tersebut ditolak (lihat ms 500H–I, 501B–D).]

**Notes**

For cases on record of appeal generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 865–890.

**Cases referred to**

*Capital Insurance Bhd v Kassim bin Mohd Ali* [2000] MLJ 193 (refd)
*Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 (refd)

**Appeal from:** Civil Suit No 22–151–94 (High Court, Ipoh)

*Leong Choo Kong* (*Leong Sai Hwa* and *Thomas Su* with him) (*CK Leong & Co*) for the appellants.

*Nga Hock Cheh* (*Kelvin Ding* with him) (*Nga Hock Cheh & Co*) for the respondents.

**Shaik Daud JCA (delivering the judgment of the court):.** This was an appeal from the decision of the Ipoh High Court which had given judgment for the respondent for vacant possession of property known as HS (D) Dqs 3754 Mukim of Sitiawan, liquidated damages for late delivery in the sum of RM68,331.94 and consequential prayers.

The respondent filed a writ of summons against the appellants based on a sale and purchase agreement of the above mentioned property executed on 15 August 1992.

At the hearing of this appeal, the appellants had also filed a notice of motion seeking an extension of time to file supplementary records of appeal to include a sealed copy of the order of this High Court, pursuant to the decision of this court in *Capital Insurance Bhd v Kassim bin Mohd Ali* [2000] MLJ 193. Before this decision, a photocopy of the order could be filed. In fact, a photocopy of the order was filed on 15 September 2000, long after the above decision was decided on 6 December 1999. It is the submission of learned counsel for the applicant/appellant that on realizing their mistake, they now file this notice of motion.

The affidavit in support of the motion gave no explanation whatsoever as to why the sealed copy of the order was not filed together with the original records of appeal. The photocopy of the order was filed long after the decision in *Capital Insurance's* case was decided. Some relevant material ought to be put before this court to enable us to exercise our discretion to

extend time for filing the supplementary records of appeal. The sealed copy of the order was available since the judgment on 14 December 1999, and yet it was not filed and no explanation was put forward for this failure. In fact, until the date of this notice of motion, the sealed order was not filed. Learned counsel for the respondents also pointed out that the chronology of events under r 18 of the Rules of the Court of Appeal 1994 was served out of time, ie six months out of time. The mistake of the solicitors in not filing the sealed copy of the order on time, cannot constitute an explanation. It is trite that the courts have a discretion to extend time to file documents. It is our view that a delay in filing, per se, is not fatal, but a delay with complete lack of explanation as to why there was a delay is fatal. It has often been reminded that 'rules of court must prima facie be obeyed', and in order to justify a court in extending the time there must be some material upon which the court could exercise its discretion, see *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228.

For the above reason we dismissed the motion with costs. In the light of this there is no appeal proper before this court and the appeal is hereby struck out with costs and we order the deposit to go to account of costs. Consequently, we discharge a stay order issued on 2 August 2000.

*Motion dismissed with costs.*

Reported by Jafisah Jaafar